TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 359.

THE UNITED STATES, APPELLANTS,

vs.

MORRIS KOHN.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 11, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 359.

THE UNITED STATES, APPELLANTS,

vs.

MORRIS KOHN.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Claimant's petition	1	3
Traverse by the Attorney General	4	4
Amended statement of claim	5	5
Final judgment by the court.	6	5
Application of Attorney General and special counsel of treasury for the allowance of an appeal	7	5
Allowance of an appeal by the Chief Justice	7	6
Finding of facts and conclusions of law	8	6
Certificate	10	6

1 *Petition.*

United States Court of Claims.—December term, 1867.

MORRIS KOHN
vs.
THE UNITED STATES. } No. 2922.

To the honorable the judges of the Court of Claims:

Your petitioner, Morris Kohn, of Philadelphia, in the State of Pennsylvania, respectfully represents to your honors as follows, viz:

1. That in the month of June, 1864, he was the owner and possessed of one hundred and eighty-two (182) bales of cotton, weighing 92,568 lbs., or thereabouts, at or near Beall's Landing, in Floyd County, in the State of Georgia, when and where it was seized and taken in the name of the United States by Capt. Geo. E. Alden, with a detachment of the 10th Ohio Volunteer Cavalry, under Major M. Curdy, and shipped to Lieut. Col. (now B'v't Maj. Gen.) J. L. Donaldson, senior and supervising quartermaster, Nashville, Tenn., (care of Capt. Geo. E. Dunbar, A. Q. M., Chattanooga, Tenn.,) and Capt. S. B. Brown, A. Q. M., Nashville, Tenn., and was then turned over by the said Capt. S. B. Brown, under orders of the said Lieut. Col. Donaldson, to Chas. A. Fuller, esq., ass't special agent of the Treasury Dep't at Nashville, Tenn., by whom it was shipped under instructions to Wm. P. Mellin, esq., supervising and general agent of the Treasury Dep't at Cincinnati, Ohio, by whom it was sold at public auction on the day of , for the account and by the authority of the United States, and the proceeds thereof placed in the treasury of the United States.

2 2. That your petitioner is not informed what the exact proceeds of the said cotton amounted to, but he has been informed and believes, and so charges the fact to be, that at fifty-six cents per pound the said proceeds amounted to the sum of fifty-one thousand eight hundred and thirty-eight 08-100 ($51,838 08) dollars, which amount your petitioner claims, after the deduction of all lawful expenses attending the disposition thereof.

3. That your petitioner was the owner of said cotton, and is now justly entitled to the proceeds thereof under the 3d section of "An act to provide for the collection of abandoned property," &c., approved March 13th, 1863, (12 Stat. at Large, ch. CXX, p. 820;) and further, that he has never given any aid or comfort to the late rebellion, nor in any way voluntarily aided, abetted, or given encouragement to the rebellion, but has at all times borne true allegiance to the government of the United States.

MORRIS KOHN.

JOHN A. WILLS, *Attorney for Claimant,*
No. 456 15th street, Washington City, D. C.

DISTRICT OF COLUMBIA,
City and County of Washington, ss:

Before me, the undersigned, Hugh B. Sweeny, a notary public for county of Washington, D. C., an officer of the United States, duly commissioned and authorized to administer oaths, personally appeared Morris Kohn, the claimant in the foregoing petition, who, on his solemn oath, deposes and says, that no assignment or transfer of the claim set forth

in said petition, or any part thereof, or any interest thereon, has been made; and that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in said petition are true.

MORRIS KOHN.

Sworn and subscribed before me this 14th day of September, A. D. 1867.

H. B. SWEENY, *Notary Public.*

3 The foregoing petition was filed October 14, A. D. 1867.

4 In the United States Court of Claims.—December term, A. D. 1868.

MORRIS KOHN
vs
THE UNITED STATES. } No. 2922.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of fifty-one thousand eight hundred and thirty-eight dollars and eight cents, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney General.

And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant did not, "within two years after the suppression of the late rebellion, prefer his claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

T. LYLE DICKEY,
Assistant Attorney General.

And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant, at the time of the filing of his said petition, was an alien, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents, therein set forth, were made and done in the administration of, and in virtue and under color of, the act of Congress entitled "An act to provide for the collection of abandoned

property, and for the prevention of frauds in insurrectionary districts within the United States," approved M'ch 12, 1863.

Whereby, and by virtue of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the government, and for the better defence of the Treasury against unlawful claims," approved July 27, 1868, the claimant is barred of his said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney General.

5 In the United States Court of Claims.

MORRIS KOHN
vs.
THE UNITED STATES. } No. 2922.

And now to wit, Feb'y 8, 1869, on motion of John A. Wills, att'y for claimant in the above-entitled case, the claimant is allowed to amend the statement of claim in his petition according to the return of the Secretary of the Treasury, showing that the net proceeds of the cotton claimed were $\$609\frac{84}{100}$ per bale, and to claim the net proceeds of his 182 bales of cotton at that rate in this suit.

By the court.

6 In the Court of Claims.

MORRIS KOHN
vs.
THE UNITED STATES. } No. 2922.

And now, to wit, 26 of April, A. D. 1869, the court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Morris Kohn, claimant aforesaid, have and recover of and from the United States the sum of one hundred and nine thousand seven hundred & seventy-one dollars twenty cents, ($\$109{,}771\frac{20}{100}$.)

By the court.

7 In the Court of Claims.—Dec. term, 1868.

MORRIS KOHN
vs.
THE UNITED STATES. } No. 2922.

To the Court of Claims:

The defendants hereby make application for the allowance of an appeal to the Supreme Court of the United States, from the judgment rendered in this action on the 26th April, A. D. 1869, in favor of the claimant, for the sum of one hundred and nine thousand seven hundred and seventy-one dollars and twenty cents, ($\$109{,}771\frac{20}{100}$.)

Dated June 2d, 1869.

ROB'T S. HALE,
Sp'l Counsel of Treasury Dep't.
T. LYLE DICKEY,
Ass't Att'y Gen'l.

Filed 3d June, A. D. 1869, in the clerk's office.

At chambers.

Ordered that an appeal be allowed in the case of Morris Kohn vs. the United States, No. 2922.

June 3, 1869.

JOS. CASEY,
Ch. J. C't of Claims.

8 *The finding of facts and the conclusions of law on said facts on which the court founded its opinion.*

We find the ultimate facts to be—

The claimant for several years prior to the rebellion resided and was engaged in the mercantile business in the town of Rome, in the State of Georgia. He was of German birth, but a naturalized citizen of the United States. He claims, under the act March 12th, 1863, the net proceeds of one hundred and eighty-two bales of upland cotton, which he alleges he owned, and the United States seized and sold, and the proceeds which are in the treasury of the United States.

1st. As early as May, 1862, the claimant was the bona fide owner of one hundred and eighty-two bales of upland cotton, which had been stored in the town of Rome, Ga., but which, for greater safety, was removed to Beall's Landing, on the Ostonaula River, and there stored.

2nd. That the cotton remained there safely until the latter end of May or beginning of June, 1864, when it was taken by officers in the
9 military service of the United States, and was shipped to the quartermaster of the department at Nashville, and by whom one hundred and eighty bales of it were turned over to the special agent of the Treasury Department at Cincinnati, Ohio, and this agent caused the same to be sold and the net proceeds to be paid into the United States treasury, amounting to the sum of one hundred and nine thousand seven hundred and seventy-one dollars and twenty cents, ($109,771 20.)

3rd. We find that the claimant did, during the late rebellion, constantly adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion.

4th. That the petition in this case preferring the claim to this court was filed on the 14th day of Oct., 1867.

And upon the facts so stated the court rendered a judgment in favor of the claimant for the amount of the net proceeds as so stated.

10 In the Court of Claims.

MORRIS KOHN
vs.
THE UNITED STATES. } No. 2922.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the Att'y General of the United States and of the special counsel of the Treasury Department for the allowance of an appeal as filed in the clerk's office 3d June, A. D. 1869, and of the order of the Chief Justice of said court, at chambers, allowing the same, of the finding of facts and conclusions of law on said facts, on which the court founded its opinion.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this ninth day of December, A. D. 1869.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on record:) Court of Claims. No. 359. The United States, appellants, vs. Morris Kohn.

Filed 11th December, 1869.

Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES, appellants,
vs.
MORRIS KOHN, appellee.
No. 359.

APPEAL FROM THE UNITED STATES COURT OF CLAIMS.

STATEMENT OF FACTS.

This was a claim, filed in the Court of Claims, for the recovery of the net proceeds of certain cotton, under the provisions of the act of Congress, dated March 12, 1863, entitled "An act to provide for the collection of abandoned property," &c. (12 U. S. Stats. at Large, 820.)

The facts of the case sufficiently appear in the petition of the claimant and in the findings of the facts by the Court of Claims, (printed Record, pp. 3 and 6,) to which reference is here made.

By them it appears that the claimant, for several years prior to the rebellion, resided and was engaged in the mercantile business in the town of Rome, in the State of Georgia; that as early as May, 1862, the claimant was the *bona fide* owner of one hundred and eighty-two bales of upland cotton; that in the latter end of May or the beginning of June, 1864, this cotton was taken by officers in the military service of the United States, and was shipped to the quartermaster at Nashville, by whom one hundred and eighty bales of it were turned over to the special agent of the Treasury Department at Cincinnati; and that this agent caused the same to be sold and the

net proceeds to be paid into the United States Treasury, amounting to the sum of $109,771 20.

It also appears that the claimant during the late rebellion constantly adhered to the United States, and gave no aid or comfort to persons engaged in said rebellion; that the petition of the claimant in this case, preferring his claim to the Court of Claim, was filed therein on the 14th day of October, 1867; and that upon these facts that court rendered a judgment in favor of the claimant for the amount of the proceeds of the cotton before stated. From this judgment the counsel of the United States have appealed to this court.

ARGUMENT FOR APPELLEE.

The only question raised by the record in this case is, that which arises on the plea of the statute of limitations filed in the court below on behalf of the United States by the Assistant Attorney General. It avers that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant did not, "within two years after the suppression of the late rebellion," prefer his claim to the proceeds of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress, approved March 12, 1863, and entitled "an act to provide for the collection of abandoned property and for the prevention of frauds in insurectionary districts within the United States." (Printed Record, p. 4.)

The 3d section of that act of Congress provides, on this point, as follows:

"Any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court (1) of his ownership of said property, (2) of his right to the proceeds thereof, and (3) that he has never given any aid or comfort to the present rebellion, [to?] receive the residue of such proceeds, after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of said

property, and any other lawful expenses attending the disposition thereof." (12 Stats. at Large, ch. CXX., p. 820.)

Thus it appears, in point of fact, (1.) That the claimant was the *bona fide* owner of the cotton and that the net proceeds thereof, amounting to the sum of $109,771 20, are now in the Treasury of the United States; (2,) that no adverse claim to the proceeds has been shown, and (3,) that the claimant during the late rebellion constantly adhered to the United States, and gave no aid or comfort to persons engaged in said rebellion.

The only question left open under this statute is, whether the petition and claim filed by the claimant in the Court of Claims, on the 14th day of October, 1867, were preferred in said court "at any time within two years after the suppression of the rebellion."

The United States have pleaded this statute of limitation in bar of the action and of a recovery by claimant, and therefore, necessarily maintain the *affirmative* of the issue, viz, that this suit was "*not* brought *within two years after the suppression of the rebellion.*" The claimant maintains the contrary. In the court below, as well as here, the United States having the affirmative of the issue, both in law and in fact, has, consequently, the burden of proof, where proof has to be made; and in case of any reasonable doubt in regard to the true construction or interpretation of this statute, that doubt, on well settled principles, must be determined in favor of the claimant. So much in regard to the attitude or relation of the parties to the issue here.

The difficulty in the case arises out of the *uncertainty* as to the point of time at which the statute of limitations began to run. The statute says, suit may be brought "at any time within two years *after the suppression of the rebellion.*" But *when* was the rebellion suppressed? We answer generally, that as against the Government in a suit brought against it under the provisions of this law, it was not suppressed before the times at wnich its suppression was officially announced by the Government itself; in other words, that it was not suppressed before the dates of its successive proclamations as to the several States named therein; that the uncertainty of

the happening of that event, both as to time and place, rendered those proclamations necessary as the only convenient mode of rendering certain and determinate that fact which was before uncertain and indeterminate; and that having made it so, the Government must be bound by its own acts in determining the point or points of time from which the statute of limitations began to run against the loyal citizens of the several States named in said proclamations, if, indeed, it is considered as beginning to run at all against any citizen before the final and complete suppression of the rebellion throughout the whole country; which is the more just and liberal interpretation of the meaning and intention of the law. The language of the law is, that "any person," without restriction as to locality, whether North or South, "may, at any time within two years after the suppression of the rebellion, prefer his claim, &c., in the Court of Claims."

Accordingly we contend, 1. That this statute of limitations did not begin to run against "any person" until after the final proclamation announcing the complete and final suppression of the rebellion throughout the whole country.

If this position cannot be maintained, then we contend,

2. That it did not begin to run against the citizens of the several States in rebellion, or against persons having claims originating therein, until after the proclamations announcing the suppression of the rebellion in the several States named therein.

The correctness of these positions and the necessity for the issue of these proclamations, in order to fix the point of time from which the statute of limitations should begin to run, may be shown by a variety of considerations.

1. The antecedent legislation on this subject and the object and purpose of Congress in passing this law.

These are clearly and fully expounded by Chief Justice Casey in the case of Margaret Bond *vs.* The United States, (2 Court of Claims Reps., p. 529, &c.)

2. The fact that the war and the statute itself both created a *disability to sue* until *after* the suppression of the rebellion,

and that some official action, "legislative, executive or otherwise," was necessary to remove that disability.

Mrs. Alexander's Cotton Case, 2 Wallace's U. S. R., pp. 419, 422, 423, Ch. J. Chase.

3. The fact that this law was passed *during* the rebellion and *before* its suppression. Its suppression was looked forward to as an *uncertain* future event, and was therefore spoken of *generally* and as an *entirety*, both as to *time* and *place*, throughout the country as a whole.

4. The language used for describing this uncertain future event—"the suppression of the rebellion." This language may import the restoration of practical or normal relations with the Government on the part of the rebellious States, as well as the mere cessation of hostilities. If the latter only had been intended, it would have been easy to have used that language. The ambiguity and uncertainty of the phrase required some future action of the Government in order to render it certain and definite.

5. The *nature* of the event. The suppression of a rebellion is not a fact *unitary* in its nature, either in point of *time* or *place*. In a country of vast extent, such as ours, it might be suppressed in one State or region and not in another, as was the fact; and therefore the rebellion could not be regarded as suppressed in the country, until *wholly* suppressed. It was an *increasing* fact, growing from day to day towards completeness—like *sunrise*—"shining more and more, unto the perfect day."

6. The *political* character of the event. The *knowledge* of it was peculiarly within the province of the Executive branch of the Government. Being charged not only with conducting the operations of the war, but with the enforcement of the laws, it had special opportunities for knowing, deciding, and for declaring "the suppression of the rebellion," as an accomplished fact, both in point of time and place.

7. The nature of the war, as a "civil war," required the issue of a proclamation, or proclamations, announcing the partial or total suppression of the rebellion, as a substitute for the ordinary treaty of peace in an international war. This principle is declared and enforced in the case of Semmes *vs.* Insurance Company, decided by Judge Shipman, United States circuit court, district of Connecticut, and reported in the American Law Register for November, 1869, pp. 677, 678, 681. (See also 2 Black's United States Reports, Prize Cases, p. 670.)

8. The purpose and intention of this law was to create a *trust* for the benefit of its beneficiaries during their *disability*. By the law in question the Government has made itself a party to an *express trust*,—that is to say, it has made itself a self-constituted trustee of the proceeds of the captured and abandoned property belonging to loyal citizens in the rebellious States, and therefore its possession of such proceeds was *not adverse* in the beginning, and cannot be so regarded until the happening of the event named.

As sovereign, we have already seen it was the duty of the Government to give notice of the termination of the rebellion. As trustee, it was also its duty to give that notice, because a trustee cannot begin to *hold adversely* to his trust until after he has given notice of his determination to hold adversely to the trust. (See Angell on Limitation, §§ 166, 168, 173, 174, 178, 472.)

The event from which the two years' limitation would begin to run against the trust, being in its nature uncertain, but within the special knowledge of the trustee, good faith requires that the trustee should give notice to the beneficiaries of the trust, of the happening of the event which terminated the trust. To fail to give this notice, and then to take advantage of the uncertainty arising out of this failure to give the notice, would be to take advantage of one's own wrong, and to deceive the beneficiaries of the trust with a view to the private gain of the trustee. The Government can never allow itself to be placed in such a position.

In view of the relation of the Government to the citizen,

and still more of the compulsory nature of the trust, and of the relation between the trustee and beneficiary of that trust, created by the Government itself, the citizen, both as citizen and beneficiary, had a right to expect and to await an official declaration of the time when the Government regarded the rebellion as suppressed, and the statute of limitation as having begun to run against the trust.

This is the view which the Government itself took of its duty at the time. Accordingly it issued three proclamations, one dated June, 1865, in relation to the suppression of the rebellion in Tennessee; another, dated April 2, 1866, in regard to the supression of the rebellion in the States of *Georgia*, South Carolina, Virginia, Tennessee, Alabama, Louisiana, Arkansas, Mississippi, and Florida; and the third, dated August 20, 1866, declaring the rebellion suppressed in Texas, "and throughout the whole of the United States of America." (Acts of Congress, for 1866; Appendix, pp. 2, 3; pp. 6, 7.)

An act of Congress, passed March 2, 1867, (ch. 145, p. 422,) declared, that a previous act of Congress to increase the pay of soldiers in the army, "shall be continued in full force and effect for three years after *the close of the rebellion, as announced by the President of the United States, by proclamation bearing date August* 20, 1866."

The Government is therefore estopped, as against the beneficiaries of this trust, from denying that the rebellion was suppressed *before* those dates.

9. In interpreting and applying this statute of limitations, it must be construed most favorably to the citizen:

1. Because, by analogy, the principles involved in the rules governing in the computation of time, ought to be applied in this class of cases.

The reason of the rule for including and excluding days in the computation of time, is thus given by Judge Washington:

"The reason of the rule is perfectly intelligible and sensible. It is, that when words of *equivocal meaning* (which these are

admitted to be) *are made use of*, and there is *no index from* the *res gestæ to show the intention of the party who used them*, the construction shall be most advantageous for him in whose favor the instrument is made. In the case of a lease first mentioned, the day of the date is *included* for the purpose of vesting in the grantee an estate in possession, rather than one in expectancy, *which is most beneficial to the grantee.* In other cases the day is *excluded for the same reason*, as *it either prolongs the interest of the grantee*, or *enlarges the time in which he is required to act.*" (*Ib.* § 49; see also, § 42, note 3.)

"Whether in the computation of time, the *day* on which an act is done or an event happens, is to be *included* or *excluded*, depends upon the circumstances and *reason of the thing, so that the intention of the parties may be effected.* Such a construction should be given as *will operate most to the ease of the party entitled to favor* and by *which rights will be secured and forf itures avoided.* This is said to be the rule in O'Connor *vs.* Towns, 1 Texas, 107; and, *besides being sensible in itself*, is *probably as accurate a statement of the result of all the cases as can be made.*" (Angell on Lim., § 50, note 3, 5 Ed. of 1869, by May; see also § 42, note 3; §§ 46–50.)

A distinction has always been taken between cases where the injury, as matter complained of, was done to the plaitiff himself, or in his presence, *so that he must know it immediately*, on the same day, and cases *where the defendant was absent at the time*, and *might not hear of it 'till afterwards.* (*Ib.* § 53, note 3; see also § 47.)

The time when the rebellion was suppressed was a fact better known to the Government than to the citizen. "The event was one totally foreign to the party whose time for deliberation was to begin to run from that event." (Angell on Lim., §§ 47, 53, note 3.

2. It must be construed most favorably to the citizen, because the effect of an adverse construction is not only to bar the remedy, but to extinguish the right, and to vest in the sovereign-trustee private property which has been clearly shown by the findings and judgment of the Court of Claims to be trust funds belonging to the beneficiaries of a sacred governmental trust; that is, to its *loyal* citizens living or owning

property in the rebel States—"to the faithful few among the faithless found;" and, therefore, to the special objects of protection by a just and wise Government.

To hold otherwise, would be to disregard the beneficent purpose and intention of the act of Congress, and, at the same time, to defeat a trust expressly created by it for the benefit of a highly meritorious class of loyal citizens.

If these principles be correct, then it follows that the statute of limitations, contained in the act, did not begin to run against the claimant in this case (who was a citizen of Georgia) until the suppression of the rebellion was officially announced by the President, in the first or second of his two proclamations, dated April 2, 1866, and August 20, 1866; that therefore the suit in this case, brought in the Court of Claims October 14, 1867, was brought in time, that being "within two years after the suppression of the rebellion," as fixed by either of these dates; and that as a further consequence the judgment of the Court of Claims in this case must be affirmed.

JOHN A. WILLS,
Of Counsel for Claimant.